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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 65

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

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ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

Appellant urgently and respectfully prays that this Court grant rehearing in the entitled proceeding as to its order dated October 13, 1958 dismissing this appeal.

The urgency of the situation covered by this petition is premised upon the fact that this Court's decision dismissing this appeal, unless reversed, will not only seriously and adversely affect appellant and its ability to carry on its exclusively interstate commerce operations as required by authority issued by the Interstate Commerce Commission, but it will likewise directly and indirectly seriously and adversely affect all other motor carriers transporting interstate and foreign commerce between points over Federal aid highways as authorized and required by certifi-

cates of public convenience and necessity and permits issued by the Interstate Commerce Commission under the applicable provisions of the Motor Carrier Act, 49 U. S. C. A. 301, *et seq.* In addition, private motor carriers of property will likewise be seriously and adversely affected in their ability to maintain operations. If the dismissal stands, every shipper and receiver of shipments of property moving in interstate or foreign commerce between points in these United States will be seriously and adversely affected. In other words, the decision in the instant case is of vital and utmost importance to the overall economy of this nation.

1. NO COURT HAS PASSED UPON THE CONSTITUTIONAL ISSUES RAISED HEREIN BY APPLYING THE FACTS OF RECORD IN THIS CASE AGAINST THE TESTS OF CONSTITUTIONALITY OR UNCONSTITUTIONALITY AS PRESCRIBED BY THIS COURT IN ITS DECISION IN CAPITOL GREYHOUND LINES v. BRICE, 339 U. S. 542 (1950).

This is not the first time the Ohio Axle Mile Tax Law (Sections 5728.01 to 5728.15, Revised Code of the State of Ohio) has been before this Court. Upon enactment of the Law and prior to the effective date thereof, certain parties including appellant, believing that they did not have "* * * a plain, speedy and efficient remedy * * * in the courts of * * *" the State of Ohio within the meaning of 28 U. S. C. A. Section 1341 instituted an action before a three-judge United States District Court, Southern District of Ohio, Eastern Division, seeking to restrain enforcement of the law. The State of Ohio filed a motion to dismiss on the basis that the plaintiffs therein "had a plain, speedy and efficient remedy in Ohio courts" within the meaning of 28 U. S. C. A. Section 1341. The three-judge Court, in a divided opinion, (Circuit Judge Allen dissenting) granted the motion to dismiss so filed by the State of Ohio (see 119 F. Supp. 812).

Subsequent to the foregoing decision of the three-judge Court, appellants in the cited case appealed the decision to this Court at which time they sought a temporary injunction pending this Court's disposition of such appeal (see 74 S. Ct. 605; 347 U. S. —). Mr. Justice Reed in a written opinion denied the motion for a temporary restraining order on the grounds, first, that "It is immaterial that here there are sixty parties * * *. Their motion is to be considered as though only one movant sought an injunction" and, second, that there existed within the meaning of 28 U. S. C. A. Section 1341 "an adequate remedy to appellants" in the courts of the State of Ohio "which they have not yet exhausted".

The appeal was dismissed upon the motion of the State of Ohio which was likewise based upon the provisions of 28 U. S. C. A. Section 1341, *supra,* the decision being a *per curiam* decision of this Court dated June 1, 1954 (see 74 S. Ct. 853; 347 U. S. 984).

At that time this Court contemplated that it would ultimately determine the constitutional issues. The opinion in chambers of Mr. Justice Reed on a motion for injunction pending appeal (see 74 S. Ct. 605 at 607) concluded with the statement that appellant and other carriers should have a final adjudication of the issues by following the "required state procedure, rather than to determine the federal issues primarily in the federal courts". Far from indicating that there was no substantial federal question, this Court's *per curiam* opinion, affirming the denial of a federal injunction under 28 U. S. C. A. §1341, contained the notation that "Mr. Douglas is of the opinion probable jurisdiction should be noted and the case set for argument." (74 S. Ct. 853, 347 U. S. 984.)

By reason of the foregoing decision of this Court, it was determined in further attempting to challenge the

constitutionality of the law, confusion would be minimized through the selection of representative assessments levied under the applicable provisions of the aforesaid Ohio Axle Mile Tax Law. Accordingly, certain representative assessments were caused to be made by the Tax Commissioner as to which protests were made by the parties assessed. In the protests, among other things, it was alleged that the law, for the various reasons set forth in this appeal, was unconstitutional on the facts and, in addition, the outstanding reciprocity agreement entered into between the States of Michigan and Ohio was applicable to said tax. This case was finally reported in the decision of the Supreme Court of Ohio in 164 O. S. 122. The Tax Commissioner, as set forth at pages 124-126 of that Supreme Court decision, *supra,* found that the aforesaid reciprocity agreement was not applicable to the Ohio Axle Mile Tax and that "As to the constitutional question raised by the petitioner, the Tax Commissioner finds that he is without jurisdiction to set aside the acts of the Legislature on the grounds that they are unconstitutional". Thereupon, appeal of the Tax Commissioner's decision was perfected to the Board of Tax Appeals for the State of Ohio which is just another division of the Department of Taxation of the State of Ohio.

The parties appellant in such proceeding before the Board of Tax Appeals went to great expense in the employment of outstanding engineers and certified public accountants who prepared and presented of record factual proof which complied with the requirements of the decision of this Court in the case of *Capitol Greyhound Lines v. Brice,* 339 U. S. 542; 70 S. Ct. 806, decided May 15, 1950. There it was established that each case is to be determined on its own facts and tests to be met by such facts are set forth at page 547 of such decision as follows:

> "Upon this type of reasoning rests our general rule that taxes like that of Maryland here *are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads.*
>
> "Our adherence to existing rules does not mean that *any group of carriers is remediless* if the total Maryland taxes are out of line with fair compensation due to Maryland. *Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of the invalidity as applied.*" (Emphasis supplied.)

Although the Ohio Board of Tax Appeals affirmed the decisions of the Tax Commissioner in the cases involved, the Supreme Court of the State of Ohio, upon appeal, held under date July 27, 1955, in its decision in the case of *Geo. F. Alger Company, et al., appellants, v. Bowers, Tax Commissioner, appellee,* (164 O. S. 122) at page 134 as follows:

> "Having determined that the 1937 reciprocity agreement between the States of Ohio and Michigan is in force and effect, it will not be necessary to pass upon the constitutional questions raised by the appellants. It is a well established rule of law that where a case can be determined upon any other theory than that of the constitutionality of a challenged statute, *no consideration will be given to the constitutional question.*" (Emphasis supplied.)

A petition for reconsideration of this decision subsequently filed by the State of Ohio was denied by the Supreme Court of Ohio. This decision of the Supreme Court of Ohio precluded the State from collecting millions of dollars in taxation while at the same time permitted the preservation of existing service rendered by the affected interstate carriers, including appellant.

Subsequent to the said decision of the Supreme Court of Ohio, the Ohio state officials, authorized to enter into reciprocity agreements with other states, purported to cancel all outstanding reciprocity agreements with all other states.

In order to again attempt to secure a day in Court on the facts with respect to the constitutional issues involved, raised in the prior cases but undetermined, it was decided that an individual carrier would be selected to protest the assessments to be made by the Tax Commissioner. Assessments were made, one covering a quarter period prior to the purported cancellation of the reciprocity agreements and another a second quarter period subsequent to the purported date of cancellation. The Geo. F. Alger Company was selected as carrier against whom the test assessments would be made. The assessments made against appellant were for the second quarter of the year 1954 and the fourth quarter of the year 1955. Appellant protested the same upon the same constitutional grounds advanced in the case resulting in the July 27, 1955 decision of the Supreme Court of Ohio, *supra*, plus the additional ground that the state officers purporting to cancel the outstanding reciprocity agreements were without authority to so act. The Tax Commissioner affirmed his prior assessments. Thereafter, the said decisions of the Tax Commissioner were appealed to the Board of Tax Appeals of the State of Ohio and the decisions of the Board of Tax Appeals are set forth at pages 76 and 83 of the record in the entitled proceeding.

Again, appellant was required to present its factual evidence in accordance with the factual tests enunciated by this Court in the *Brice* case, *supra, to an administrative body, namely, the Board of Tax Appeals.* It was agreed

that the record presented before the Board in the first cases as covered by the decision of the Supreme Court of Ohio dated July 27, 1955, *supra*, be made a part of the record covering the appeal in the second proceeding (see record pages 6 and 7 in the entitled proceeding).

Subsequent to the hearing in the proceedings last discussed, the Board of Tax Appeals rendered its decisions referred to above (R. 76 and R. 83) affirming the decisions of the Tax Commissioner applicable to the assessments in question. *In these cases, as in the former cases, the Board held that "it, being a quasi-judicial body, must and does consider all sections of the Ohio Revised Code to be constitutional enactments"* (see R. 82 and R. 90). Thereafter, an appeal from said decisions of the Board of Tax Appeals was taken to the Supreme Court of Ohio. Again, in addition to other questions properly raised, the question of alleged unconstitutionality of the Ohio Axle Mile Tax Law, on the facts, as measured by the decision of this Court in *Capitol Greyhound Lines v. Brice, supra,* was properly presented to the Court. This factual presentation was made upon an extensive record which proved that the Ohio Axle Mile Tax Law produces compensation to Ohio which is far *"in excess of fair compensation for the privilege of using state roads" as to which the Federal Government pays federal aid for the construction and maintenance of the same in amounts as high as 90% of the total cost. Extensive evidence was presented to show that the Ohio Axle Mile "taxes are out of line with fair compensation due to" Ohio. Notwithstanding the terrific expense incurred in the development of the requisite evidence, the Supreme Court of Ohio with no consideration of the same upheld the decision of the Board of Tax Appeals by its decision dated June 19, 1957, cited 166 O. S. 427.*

Notwithstanding the clear and unmistakable language of this Court, quoted above from *Capitol Greyhound Lines v. Brice*, the Supreme Court of Ohio in commenting upon the aforesaid submitted evidence stated at page 428 of its decision that:

> "*This argument, although interesting, is one which would have better been directed to the General Assembly, since this court in determining the validity of the tax must confine itself to a determination of whether the tax is discriminatory, imposes an undue burden on interstate commerce and bears a reasonable relationship to the purpose for which it was created.*" (Emphasis supplied.)

But the federal constitutional questions referred to above under Brice, must be determined by considering the facts of record *in each case! This the Ohio Court did not do.*

The decision does not contain a scintilla of discussion of the extensive factual evidence presented in this case in accordance with the requirements and rules laid down by the decision of this Court in *Capitol Greyhound Lines v. Brice*. In other words, the decision of this Court dated October 13, 1958, in affirming the decision of the Supreme Court of Ohio, just cited, deprives appellant and others similarly situated of their vested right to have a full and complete hearing before this Court. Stated differently, if this petition for rehearing is not granted, appellant and the class which it represents will be actually deprived of any consideration by any court of the evidence submitted by it, which evidence meets the tests enunciated by this Court, in *Capitol Greyhound Lines v. Brice*. We humbly believe that this Court, upon reconsideration, will grant rehearing in this case. Otherwise, justice will not prevail.

Again, it is emphatically stated that no case before this Court involves issues of greater significance and im-

portance to the o erall national economy of this country of ours than do the issues in this case.

Therefore, it is respectfully submitted that out of all of the proceedings that have been instituted in connection with the Ohio Axle Mile Tax Law, as hereinbefore cited, *not one court has passed upon the evidence presented to meet the test enunciated by this Court in Capitol Greyhound Lines v. Brice.* This must be done, otherwise a reversal of the decision in that case will occur without anyone being advised in connection therewith.

In addition to the foregoing, it is submitted as follows:

2. THE ARBITRARY "NO-RECIPROCITY" POLICY ADOPTED BY OHIO STATE OFFICIALS IN ABROGATION OF THE EXPRESS PROVISION FOR RECIPROCAL EXEMPTION AGREEMENTS INSERTED BY THE STATE LEGISLATURE IN THE OHIO AXLE MILE TAX LAW IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS. DISMISSAL OF THIS APPEAL IS CONTRARY TO COOPER v. AARON IN DENYING ALL JUDICIAL RELIEF TO APPELLANT FOR VIOLATION OF FUNDAMENTAL FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY OFFICIALS AND COURTS OF THE STATE OF OHIO.

This appeal presents a clear-cut Fourteenth Amendment due process issue arising from application of the Ohio Axle Mile Tax to interstate vehicles in respect of which a highway use tax is paid to other sttaes.

The Ohio Legislature clearly, deliberately and unequivocally made express provision for reciprocal exemption agreements in Section 5728.15 of the Act (quoted in Jurisdictional Statement, Appendix B, p. 61a). The inclusion of this provision was a necessary condition precedent to the enactment of the Ohio Axle Mile Tax

Law, whether or not reciprocity was constitutionally required.

The clear objective of the Legislature was the exemption of out-state carriers, including Appellant, from all provisions of the Act, to be accomplished through reciprocity agreements between Ohio and the other qualified states of the nation. Multiple burdens upon interstate commerce were thus to be avoided.

But Appellee and the other Ohio State officials have taken it upon themselves arbitrarily to abrogate the reciprocal exemption agreement section of the Act, with the consequence that the underlying public policy of the State in enacting the section has been struck down, interstate commerce burdened, and the evil which the section was designed to prevent created.

They have arbitrarily and publicly announced, and have undeviatingly applied, a tough "no-reciprocity" policy—a fixed and inflexible determination never to make an Axle Mile Tax reciprocal agreement with any state.

They take the position that they have cancelled all reciprocal exemption agreements which Ohio had with many states, for the avowed purpose of attempting to insure that there would be no claim of exemption from the Axle Mile Tax; they have specifically refused to sign a reciprocal exemption agreement signed and tendered to Ohio by the State of Michigan in accordance with the Ohio Act.

The Michigan officials involved have in writing condemned such action as a denial of rights "by whim or caprice". And in H. Res. 407, 83rd Cong. 2nd Sess., such action was referred to by Congress as "discriminatory and unilateral."

Appellee Tax Commissioner admits that imposition of the challenged assessment on Appellant's Michigan- and

Indiana-registered vehicles arises wholly out of such "no-reciprocity" policy.

And in the decision appealed from the Supreme Court of Ohio ruled merely that the power conferred under the reciprocal exemption section was discretionary. That Court thus sanctioned this arbitrary administration of the Ohio Axle Mile Tax Law without judicial review or treatment of the "no reciprocity" policy, without any record or findings to show whether the exercise of the alleged "discretion" conferred was reasonable, and despite its effect of unconstitutionally burdening interstate commerce and restricting the exercise of federally granted rights and duties under Interstate Commerce Commission Certificates and Permits.

To complete the denial to interstate carriers of a day in court with respect to the Ohio Axle Mile Tax Law and the "no-reciprocity" policy under which it is being administered, the Supreme Court of Ohio has subsequently ruled against review thereof by way of mandamus. *State ex rel. Interstate Motor Freight System v. O'Neill,* 167 Ohio State 139, 146 N. E. 2d 720 (December 18, 1957).

Appellant has to date had no judicial review. That it has been denied due process of law in violation of the Fourteenth Amendment is clear.

In *Yick Wo v. Hopkins,* 118 U. S. 386 (1886), a laundry licensing ordinance, valid on its face, was held to have been rendered unconstitutional for lack of due process through its arbitrary administration by the Board of Supervisors shown to have refused to license any Chinese whatever. The inflexible "no-reciprocity" approach of appellee and other Ohio officials under the Ohio Axle Mile Tax Law represents an equally arbitrary abuse of power.

Appellee and the other State officials have contended throughout that they are not required to make any record

with respect to their application of this unlawful policy to the detriment of appellant and others similarly situated. This means that there is no record whatever as to the basis for, and no means of adequate judicial review of, the reasonableness of their exercise of the "discretion", which the Supreme Court of Ohio indicated was reposed in them. This also violates due process. *Southern Railway Co. v. Virginia,* 290 U. S. 190, 197-198 (1933).

In due process cases involving Ohio statutes, where only one court—the State Supreme Court—reviews administrative actions (as in the present case), this Court has particularly emphasized that a record showing of the reasonableness of administrative action is constitutionally essential to adequate judicial review. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292, 303-305 (1936); *West Ohio Gas Co. v. Public Utilities Commission of Ohio,* 294 U. S. 63, 68-69 (1934).

It is thus clear that the Act as so administered and interpreted by the courts of Ohio, and the assessment herein complained of, is rendered unconstitutional and void.

Through arbitrary action by appellee and other officials of the State of Ohio appellant has been deprived of its property in the form of millions of dollars of tax which would otherwise not be payable, and its Federally-granted right to operate under its Interstate Commerce Commission Certificate (which requires rendition of continuous service to the public) has been unconstitutionally restricted.

Appellant and others similarly affected have been summarily denied and refused protection by the Supreme Court of Ohio against precisely the kind of "administrative lawlessness" condemned by this Court in *Peters v. Hobby,* 349 U. S. 331, 345 (1955).

This Court's Order of October 13, 1958 dismissing the appeal herein thus denies to appellant its only opportunity for judicial review with respect to a deprivation by State officials and the courts of Ohio of fundamental due process rights guaranteed by the Fourteenth Amendment.

Such a result is utterly inconsistent with the unanimous pronouncement made on September 29, 1958, in the case of *Cooper v. Aaron*, 358 U. S. — (1958), as to the paramount duty of this Court to protect litigants against denial of their rights under the Fourteenth Amendment by action on the part of a state government, whether it be by officials or by the courts of the state. This Court there said that rights under the Fourteenth Amendment "can neither be nullified openly and directly by * * * state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously' ".

Where arbitrary action by State officials will operate, as here, to cripple or destroy not only appellant but many other interstate carriers, and will adversely affect the entire economy by imposition of an undue burden on interstate commerce, the due process issue is clearly of sufficient importance to bring into play the duty of this Court, reiterated in *Cooper v. Aaron*, "to say what the law is".

3. DISMISSAL OF THIS APPEAL ON THE COMMERCE CLAUSE ISSUES IS CONTRARY TO CAPITOL GREYHOUND LINES v. BRICE. A DEPARTURE FROM CONSTITUTIONAL PRINCIPLES SHOULD NOT OCCUR WITHOUT ARGUMENT AND A DECISION ON THE MERITS.

This Court's last pronouncement on the constitutional Commerce Clause limitations on state highway use taxation was in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950). This Court there adopted the principle that

whether a tax levied on interstate commerce, in theory for road use, exceeded fair compensation to the state for its share of the facilities furnished was a question of fact to be determined in each case on the basis of the record presented. Interstate carriers were assured that a record showing that state highway taxes exceeded fair compensation to the State would be considered by this Court "proper proof [to] obtain a judicial declaration of their invalidity as applied."

The record herein shows precisely this without any controverting proof. It shows that the Ohio Axle Mile Tax Law, itself involving approximately $20,000,000 per year, results in the total Ohio highway taxes for the year 1954 exceeding by more than $23,000,000 the revenues needed to finance the Ohio State highway program as adopted by the State. It shows that imposition of the tax upon appellant's exclusively interstate operations will cost appellant more than half a million dollars and turn its profits into a loss of more than $300,000, and will impose an annual Axle Mile Tax of up to $2,250 per vehicle, with total annual Ohio highway taxes of up to $4,262 per vehicle.

Moreover, the excessiveness of Ohio highway taxes is even greater now than at the time of enactment of the Act, by reason of the 1956 Federal Highway Aid Legislation under which the Federal Government now pays 90% of the cost of building and maintaining the interstate highways which alone are used by appellant in Ohio, with the State paying only 10%.

Brice established the principle that each case involving a Commerce Clause question of "fair compensation" or "unfair compensation" to a State would be determined on the facts *in each case*. Dismissal of this Appeal will overrule Brice, that each case is to be determined on its own facts, without argument or opinion.

Dismissal of this appeal, presenting precisely the kind of record which this Court in the *Brice* case said would warrant a judicial declaration of invalidity of highway use taxes applied exclusively to interstate carriers, radically changes the rules of constitutional law, without affording to the motor carrier industry, and to the public which will be adversely affected, the benefit of argument, discussion, and consideration by this Court and guidance for the future.

4. DISMISSAL WITHOUT DETERMINATION BY THIS COURT OF THE CONSTITUTIONALITY OF THE OHIO AXLE MILE TAX LAW WILL RESULT IN CHAOS IN THE TRUCKING INDUSTRY, A MULTIPLICITY OF LITIGATION AND A DESTRUCTIVE INTERSTATE HIGHWAY TAX WAR.

In *Noerr Motor Freight, Inc. v. Eastern Railroad President's Conference*, 155 F. Supp. 768 (E. D. Pa. 1957) a federal district court, describing a gigantic conspiracy between the railroads and the Byoir public relations firm for the promulgation in many states of legislation aimed at injuring the motor carrier industry, found that the Ohio Axle Mile Tax Law was one "of the outstanding accomplishments of Byoir for the railroads in the entire campaign", involving the furnishing to representatives of the Ohio Legislature of "slanted statistics" (155 F. Supp., at 784-786). Dismissal of the appeal herein may serve to accomplish the disruption of the motor carrier industry.

Prosecution of assessment cases under the Ohio Axle Mile Tax Law totalling many millions of dollars has been delayed awaiting the decision of this Court on the constitutional issues. The order of dismissal denies such a decision with no indication of this Court's thinking on these substantial questions. Since collection of such as-

sessments would bankrupt many interstate motor carriers, it is fair to assume that they will not submit without a prior adjudication of these issues on their merits. A multiplicity of burdensome litigation would thus be necessary for the motor carrier industry to obtain answers to these questions involving life or death for many of its members, all of which could be avoided by this Court hearing and determining this appeal on the merits.

The record below shows that Michigan has already expressly warned Ohio of the "dire consequences which you will automatically invoke by" the "no-reciprocity" policy. A 1956 Congressional Committee Staff Report (House Doc. No. 449, 84th Cong., Second Sess.) shows that more than 17 states have readied procedures for retaliatory taxation of interstate motor carrier commerce, with application of certain of these retaliatory levies against Ohio being withheld pending the outcome of this appeal.

An interstate highway tax war, obstructing the flow of commerce among the states, with a multiplicity of heavy state taxes imposed on interstate vehicles, can disrupt the entire economy of the country which is so dependent today upon interstate motor transportation. Such consequences ought not to be allowed to occur without a determination by this Court of the substantial constitutional issues.

Certainly, the constitutional issues herein cannot be deemed frivolous or completely predetermined by earlier decisions. Moreover, if the issues are deemed properly presentable by certiorari, this appeal should be so considered under §2103 of the Judicial Code. In any event, argument and a decision on the merits is most urgently called for.

CONCLUSION

Wherefore, Appellant prays that this Court grant this Petition for Rehearing in respect of its Order of October 13, 1958 dismissing the appeal herein, and that probable jurisdiction be noted.

Respectfully submitted,

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I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay.

EDMUND M. BRADY.